

No. 10982

United States
Circuit Court of Appeals
For the Ninth Circuit.

T. A. SMALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

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Witnesses for the United States—(Contd.)

Rollandelli, Mary

—direct 16

—cross 17

Certificate of Clerk to Transcript of Record
on Appeal 45

Designation of Contents of Record on Appeal 44

Information 2

Instructions to the Jury 36

Minute Entries:

January 11, 1944—Defendant's Plea of
Not Guilty Entered, etc. 4February 8, 1944—Trial, Motion for a
Directed Verdict Denied, Verdict of
Guilty 5February 15, 1944—Motions for New Trial
and in Arrest of Judgment Denied,
Judgment 10

Motion for Arrest of Judgment..... 8

Motion for New Trial 7

Names and Addresses of Attorneys of Record 1

Notice of Appeal 11

Order Settling Bill of Exceptions..... 43

Stipulation of Counsel re Order for Record
on Appeal 42

Verdict 7

NAMES AND ADDRESSES OF ATTORNEYS

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Attorney for Defendant and Appellant.

Mr. FRANK J. HENNESSY,

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San Francisco, California.

Attorney for Plaintiff and Appellee.

In the Southern Division of the United States District Court, for the Northern District of California.

No. 28263-S

UNITED STATES OF AMERICA,

Plaintiff,

vs.

T. A. SMALL,

Defendant.

INFORMATION

(Emergency Price Control Act of 1942; Title 50 U.S.C.A., Sections 902(a), 904(a), and 925(b).)

Comes now Frank J. Hennessy, United States Attorney for the Northern District of California, and by leave of Court first had and obtained informs this Court: That on or about the 5th day of October, 1943, at Redwood City, County of San Mateo, State of California, within the Southern Division of the Northern District of California, and within the jurisdiction of this Court, *F. A. Small*, (hereinafter called "the said defendant") did wilfully and unlawfully sell to one *F. W. Larkin* certain distilled spirits, to-wit, 100 cases each of which said 100 cases contained twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, at a price of \$46.50 per case, which said price of \$46.50 per case for each of said 100 cases, each case containing twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, was in excess of and higher than the maximum price established by law, to-wit, \$27.00 per case for each case

containing twelve 5th-bottles of Baltimore Club Special Reserve Whiskey, as [1*] the said defendant then and there well knew. (Maximum Price Regulation No. 445, Article VII, Section 7.8; 8 F.R. 11161.)

FRANK J. HENNESSY

United States Attorney

United States of America,
State and Northern District of California,
City and County of San Francisco—ss.

Alfred W. Worthington, being first duly sworn, deposes and says: That he is an Investigator employed by the Office of Price Administration; that he has read the foregoing Information; that he is familiar with the facts therein alleged concerning the offense therein described, and that the same are true of his own knowledge.

ALFRED W. WORTHINGTON

Subscribed and sworn to before me this 20th day of December, 1943.

[Seal] E. H. NORMAN

Deputy Clerk, U. S. District Court, Nor. Dist. of California.

[Endorsed]: Filed Dec. 21, 1943. [2]

*Page numbering appearing at foot of page of original certified Transcript of Record.

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 11th day of January, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable A. F. St. Sure,
District Judge.

[Title of Cause.]

DEFENDANT'S PLEA OF NOT GUILTY
ENTERED; Etc.

This case came on regularly this day to plead. The defendant T. A. Small was present in proper person and with his attorney Fred. McDonald, Esq. Valentine C. Hammack, Esq., Assistant United States Attorney, was present for and on behalf of the United States.

The defendant was called to plead and thereupon said defendant entered a plea of "Not Guilty" to the Information, which said plea was ordered entered.

After hearing the Attorneys, it is ordered that this case be continued to January 26, 1944 for trial.
(Jury) [3]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 8th day of February, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable A. F. St. Sure,
District Judge.

[Title of Cause.]

TRIAL, MOTION FOR A DIRECTED VERDICT DENIED, VERDICT OF GUILTY

This case came on regularly this day for trial. The defendant T. A. Small was present in Court with Fred McDonald, Esq., his attorney. Valentine C. Hammack, Esq., Assistant United States Attorney, was present for and on behalf of the United States.

Thereupon the following persons, viz:

1. Milton J. De Barr
2. F. W. Blanch
3. Joseph Shaddick
4. Marguerite Brooks
5. Mrs. Elizabeth Newman
6. Raymond L. Lilly
7. Mrs. Charlotte Bauer
8. Albert Franzen
9. James L. Culpepper
10. R. D. McCrea

11. Miss Mary Barmby
12. Mrs. Frances Mouille

twelve good and lawful jurors, were, after being duly examined under oath, accepted and sworn to try the issues joined herein. Mr. Hammack made a statement to the Court and Jury on behalf of the United States.

Mr. McDonald made a statement to the Court and Jury on [4] behalf of the defendant.

Mary Rolandelli, Fred Wm. Larken, George Moncharsh, and Clyde D. Byrd were sworn and testified on behalf of the United States. Mr. Hammack introduced in evidence and filed U. S. Exhibits Nos. 1, 2, 3 and 4. The defendant offered no evidence. Thereupon the evidence was closed. Mr. McDonald made a motion for a directed verdict, which motion was ordered denied. After argument by the attorneys and the instructions of the Court to the Jury, the jury at 2:52 P.M. retired to deliberate upon its verdict. At 3:09 P.M. the jury returned into Court and upon being asked if it had agreed upon a verdict, replied in the affirmative and returned the following verdict, which was ordered filed and recorded, viz:

“We, the Jury, find T. A. Small, the defendant at the bar, Guilty.

J. L. CULPEPPER,
Foreman.”

The Jury upon being asked if said verdict as recorded was its verdict, each juror replied that it was. Ordered that the Jury be discharged from further

consideration hereof and be excused until further notice.

Further ordered that the matter of the pronouncing of judgment and this case be continued to February 15, 1944, and that the defendant be remanded into the custody of the U. S. Marshal and that a mittimus issue. [5]

[Title of District Court and Cause.]

VERDICT OF GUILTY

We, the Jury, find T. A. Small, the defendant at the bar Guilty.

J. L. CULPEPPER

Foreman

[Endorsed]: Filed Feb. 8, 1944. [6]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Now comes the defendant, F. A. Small in the above entitled action and moves the above entitled Court for an order vacating the verdict of the jury convicting said defendant and granting a new trial on the information herein for the following, and each of the following, causes materially affecting his constitutional rights, to-wit:

1. That the verdict is contrary to the evidence adduced at the trial herein.

2. That the verdict is not supported by the evidence in the case.

3. That the evidence adduced at the trial is insufficient to justify said verdict.

4. That said verdict is contrary to law.

5. That the verdict of the jury was the result of prejudice and bias to the damage of this defendant.

6. That the Court erred in refusing to direct a verdict of not guilty at the close of all the evidence in the case.

This motion is made upon the minutes of the Court and all records, files and proceedings and testimony and evidence therein.

Dated: February 15, 1944.

LOUIS R. MERCADO

FRED McDONALD

Attorney for Defendant.

[Endorsed]: Filed Feb. 15, 1944. [7]

[Title of District Court and Cause.]

MOTION FOR ARREST OF JUDGMENT

Now comes the defendant T. A. Small in the above entitled action and against whom a verdict of guilty was rendered on the 8th day of February, 1944, in the above entitled cause, and moves the Court to arrest the judgment against said defendant and to hold for naught said verdict of guilty rendered against said defendant for the following reasons:

1. That said information does not state facts sufficient to constitute a public offense.

2. That the information is uncertain, *intelligible*, ambiguous and insufficient in law to apprise the defendant of the nature of the charge against him.

3. That the above entitled Court has no jurisdiction over the person of the defendant.

4. That the defendant has been convicted without due process of law and in violation of Articles 3, 4, 5 and 6 of the amendments to the Constitution of the United States.

5. That the evidence is not sufficient to support the verdict of guilty to said information in this, that there is no evidence to show that the said defendant did sell the liquor charged in the information to said F. W. Larkin, as charged in said information.

6. That the evidence is insufficient to support the information in this, that there is no evidence to show that said defendant was a wholesaler and came within the provisions of Title 50 U.S.C.A., Sections 902(a), 904(a) and 925(b).

7. That the verdict of the jury is contrary to law.

Wherefore, because of said errors in said record herein, no lawful judgment may be rendered by the Court, this defendant prays that this motion be sustained and that the judgment of conviction against him be arrested and held for [8] naught and that he may have such other and further orders as may seem just in the premises.

LOUIS R. MERCADO

FRED McDONALD

Attorney for Defendant.

[Endorsed]: Filed Feb. 15, 1944. [9]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 15th day of February, in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable A. F. St. Sure,
District Judge.

UNITED STATES OF AMERICA

vs.

T. A. SMALL

MOTIONS FOR NEW TRIAL AND IN ARREST OF JUDGMENT DENIED, JUDGMENT

This case came on regularly this day for the pronouncing of judgment. The defendant T. A. Small was present in the custody of the United States Marshal and with his attorneys, Fred. McDonald, Esq., and Louis Mercado, Esq., A. J. Zirpoli, Esq., Assistant United States Attorney, was present for and on behalf of the United States.

The defendant was called for judgment. Mr. McDonald made a motion for new trial and a motion in arrest of judgment, which motions were ordered denied. After hearing the defendant and Mr. McDonald, and said defendant having been asked whether he has anything to say why judg-

ment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, T. A. Small, having been convicted on the verdict of the jury of guilty of the offense charged in the Information, be and he is hereby [10] committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of Six (6) Months.

Ordered that judgment be entered herein accordingly.

It Is Further Ordered that this Clerk of this Court deliver a certified copy of the judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

The Court recommends commitment to a County Jail.

Further ordered that bail be fixed in the sum of \$1000.00 for release of defendant pending appeal herein. [11]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: T. A. Small, #314 Braneson Avenue, San Mateo, California.

Names and Addresses of Appellant's Attorneys: Fred McDonald and Louis R. Mercado, Room 935, Mills Building, San Francisco, California.

Offense: Violation of the Emergency Price Con-

trol Act of 1942, Title 50, U.S.C.A., Sections 902(a), 904(a) and 925(b).

That the defendant on or about the 5th day of October, 1943, at Redwood City, County of San Mateo, State of California, did wilfully and unlawfully sell to one F. W. Larkin, certain distilled spirits, to-wit: 100 cases, each of which 100 cases contained twelve one-fifth bottles of Baltimore Club Special Reserve Whiskey, at the price of \$46.50 per case, which said price of \$46.50 per case for each of said one hundred cases, each containing one-fifth bottles of Baltimore Club Special Reserve Whiskey was in excess of the maximum price established by law, to-wit: \$27.00 per case for each case containing twelve one-fifth bottles of Baltimore Club Reserve Whiskey, as said defendant then and there well knew (Maximum Price Regulation No. 445, Article VII, Section 7.8; 8F.R. 11161.)

Judgment Date: February 15, 1944.

Description of Judgment and Sentence: "Guilty".
Sentence: Six (6) months in the County Jail.

Name of Prison where now confined: County Jail of the City and County of San Francisco, State of California.

I, the above named appellant, hereby appeal to the United States Circuit Court of Appeals of the Ninth Circuit from the judgment above named upon the grounds set forth below: [12]

GROUND OF APPEAL

I.

That the learned trial Judge committed errors

in law arising during the course of the trial and erred in decisions of questions of law arising during the course of the trial.

II.

That the evidence produced and received upon the trial of said cause was insufficient as a matter of law to justify the verdict of the jury.

III.

That the learned trial Judge erred in denying the motion made by counsel of the defendant for a directed and instructed verdict of "Not Guilty" at the conclusion of all the evidence in the case for the reason that taking of all said evidence in said case it is not sufficient as a matter of law to support the verdict of "Guilty".

IV.

That the information on file in the above entitled cause does not state facts sufficient to charge the defendant with the commission of a crime against the United States.

V.

That the trial Court erred in not instructing the jury to return a verdict of "Not Guilty".

VI.

That the trial Court erred in not granting the motion of the defendant for a new trial.

VII.

That the trial Court erred in denying the motion of the defendant for arrest of judgment.

Dated: February 15, 1944.

T. A. SMALL

Appellant

LOUIS R. MERCADO

FRED McDONALD [13]

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Feb. 15, 1944. [14]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now comes the defendant, T. A. Small, in the above entitled action who has heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the verdict and judgment of conviction heretofore given, made and entered against him in the above entitled cause pending in the Southern Division of the United States District Court for the Northern District of California, and files this, his Assignment of Errors, upon which he will rely in the prosecution of his said appeal to the United States Circuit Court of Appeals.

I.

That the Court erred in refusing to grant defendant's motion for a directed verdict made at the close of all of the testimony in this case.

II.

That the Court erred in refusing to instruct the jury to [15] find the defendant Not Guilty.

III.

That the Court erred in refusing to grant the defendant's motion for arrest of judgment.

IV.

That the Court erred in refusing to grant the defendant's motion for a new trial.

Wherefore said defendant, T. A. Small, prays that the judgment of said District Court be reversed and that said information against him be quashed and that he may go hence without day.

FRED McDONALD

Attorney for said Defendant.

Receipt of the above Assignment of Errors copy admitted this 31st day of March, 1944.

FRANK J. HENNESSY

United States Attorney

By VALENTINE C. HAMMACK

Assistant United States

Attorney

[Endorsed]: Filed April 7, 1944.

[Title of District Court and Cause.]

BILL OF EXCEPTIONS

Be It Remembered that the above entitled cause came on regularly for trial before the Court, with a jury, Valentine C. Hammack, Esq. appearing for the United States of America, and Fred McDonald,

Esq. appearing as counsel for the defendant T. A. Small, Honorable A. F. St Sure, Judge of said court presiding. Thereupon the following proceedings were taken and had:

The United States Attorney made an opening statement of the matters and things he expected to prove. Counsel for the defendant reserved his right to make an opening statement at the conclusion of the government's case.

MARY ROLLANDELLI,

called as a witness on behalf of the United States of America, being first duly sworn, testified in substance as follows: [17]

Direct Examination

By Mr. Hammack:

My name is Mary Rollandelli. I am a secretary. I am secretary of Rollandelli Company. Rollandelli Company is a corporation. Rollandelli Company are the distributors of Baltimore Club Special Reserve Whiskey. There was a purchase of several hundred cases made of Baltimore Club Special Reserve Whiskey by the Rollandelli Company sometime in October or November, 1943. There were 1500 cases purchased. These cases were purchased from Gordon-O'Neill Company, Inc., Distillery at \$20.40 per case, f.o.b. Our cost per case for delivery in San Francisco was \$21.21. Figuring the State tax, the ceiling price in San Francisco and vicinity per case to the retail trade for this Baltimore Club Special Reserve Whiskey was between \$26.60 and

(Testimony of Mary Rollandelli.)

\$27.00 per case, no higher. That was a case of fifths; in fact, all of this whiskey was in fifths. I have the invoice showing the purchase price of this whiskey.

(Shows witness a document).

This document shows the total amount of whiskey purchased and the price—1500 cases of Baltimore Club Special Reserve Whiskey at \$20.40 per case—\$30,600.00. That was the total price of the whiskey f.o.b. Jersey City.

(Invoice introduced in evidence and marked
“United States’ Exhibit No. 1.”)

I arrived at my ceiling price by taking the f.o.b. cost, then my freight, adding State taxes of \$1.92 and figuring a 15% mark-up for the O.P.A. ceiling. I remember an order being served on Rollandelli Company restraining them from releasing any of that whiskey sometime in November. I do not remember just about when that was served. As a result of that restraining order, no whiskey was released during the pendency of that [18] restraining order.

Cross Examination

By Mr. McDonald:

I am the secretary of the Rollandelli Company. Mr. Gene Rollandelli is my father. In reference to this whiskey, we were notified of the original cost by the distillery; the Gordon-O'Neill Company informed us of the cost of the whiskey. It is a blend whiskey. I do not know what proof it was. The

(Testimony of Mary Rollandelli.)

price was quoted by the Gordon-O'Neill Distillery. I do not know whether anyone else knew of this price besides the Rollandelli Company. We added 80c for freight per case and \$1.92 per case excise tax and a mark-up of \$3.47. That is how we arrived at the ceiling price. I do not know Mr. Small. I never saw the gentleman until I saw him here in the courtroom. The Rollandelli Company had no transaction with him at any time. The Rollandelli Company never sold any whiskey to a man by the name of F. W. Larkin. I never heard of him. The 1500 cases of liquor were delivered to the Rollandelli Company by the Gordon-O'Neill Company. An injunction was served on us restraining us from releasing any of this whiskey. This liquor was afterwards sold. None of it was sold to Mr. Larkin. It was sold to regular customers of the Rollandelli Company. The Rollandelli Company never had any transaction with F. W. Larkin. We never dealt with him or heard of him.

Q. You never heard of T. A. Small?

No. We have never had any business dealings with Mr. Small. He was not an agent for the Rollandelli Company.

F. W. LARKIN,

called as a witness for the United States, being first duly sworn, testified as follows: [19]

Direct Examination

By Mr. Hammack:

My name is F. W. Larkin. My home address is Redwood City. I am engaged in the bar business. I know the defendant, T. A. Small. I have known him for a number of years. I had occasion to have conversation with him in the early part of October, 1943, when he came to collect dues. It was in the early part of October 1943. He came to collect in my barroom from the boys who work for me. He was the business agent of the Bartenders' Union. At that time I had a conversation with Mr. Small. The conversation was that liquor was hard to get and that he was all around and maybe he would try to find where I could get some. I said, "If you can find any for me, I will appreciate it." He said, "If anything comes up, I will let you know." A little later, he said that he thought he could get ahold of some whiskey at \$46.00 per case if I would take 100 cases. I think the brand was Baltimore Club—I am not sure. I have never seen any of it. I said that I would wait and see as I knew that I could not handle that much. He quoted a price of \$46.00 per case. There was nothing said at that time about how the whiskey was to be paid for. After that, I contacted the lady across the street and another lady further up the highway. I saw Mr. Small in his office in San Mateo. I made a down payment on

(Testimony of F. W. Larkin.)

the whiskey. I paid \$19.50 per case down. My check was \$780.00, Mrs. Bertolucci's was \$185.00. Mrs. Baer produced the third check for 50 cases. I think the total was something like \$975.00. Those checks represented \$19.75 per case. I was supposed to go up and get the whiskey. He told me the name of the warehouse to get it—Rollandelli was the company that was supposed to have it. He told me this the next time I went to find out when we could get it. I had [20] given him the original check at \$19.50 a case. That was for myself, Mrs. Bertolucci and Mrs. Baer.

I took a truck and went up after the whiskey in about three weeks. Mr. Small told me to go up there. He just said, "Go up and get it, there it is." I took the balance of the purchase price with me.

Q. How much was that?

\$27.00 per case for forty cases. The check was made out to Rollandelli. I also had the checks of Mrs. Baer and Mrs. Bertolucci for the balance of the purchase price at \$27.00 per case. When I got up there, a man was just coming out with some—I do not recall—ten cases for Oakland somewhere, and he told me I had to go down to the Rollandelli Warehouse. I went down there and nobody knew anything about it down there. I went to the warehouse—they did not give me the whiskey. I went back to Rollandelli's and they said they did not know anything about it. I never received the whiskey. I got my money back from Mr. Small. He came and told me that the deal was illegal and

(Testimony of F. W. Larkin.)

he didn't want anything to do with it. He gave me back the money and I distributed it to the others. Mr. Small did not tell me there was an injunction against Rollandelli's from releasing the whiskey. It was four or five days, if I am not mistaken, or something like that, after coming to San Francisco, that Mr. Small gave me my money back.

I recognize a check dated September 5, 1943 to "Cash"—Mrs. Clara Baer's for \$975.00. I received that from Mrs. Baer. I went right up to the OPA office where Mr. Small was and gave it to him right there. I gave the check to Mr. Small. This check for \$195.00, dated October 5, 1943, is Mrs. Bertolucci's check. I gave that check to Mr. Small.

(Checks introduced in evidence.)

My own checks were cashier's checks—one of them is in the [21] amount of \$780.00 and this large one is made out to the Rollandelli Company. I cashed them back myself.

Cross Examination

By Mr. McDonald:

I have never seen a bottle of Baltimore Club Special Reserve whiskey. I have never seen that kind of whiskey in my experience. I conduct a tavern in Redwood City. I have been conducting it for 31½ years. Mr. Small is the official of the Bartenders' Union. He collects dues from two bartenders that are employed in my tavern. I am also a member of the Union. I have been such since 1908. He came in to collect the dues sometime in

(Testimony of F. W. Larkin.)

October. We discussed the shortage of liquor in San Mateo County. I told him that if the shortage could not be relieved, I would have to close my place of business. I told him that if the place closed, that probably the two bartenders that I employed would be out of a job. I told him that a number of people in Redwood City were in the same predicament and he said he would see what he could do to get me some liquor. Sometime afterwards, he came to me and told me he thought he could get me some liquor. After I found that I could handle it, I went to his office and gave him the checks. I talked with Mrs. Bertolucci and Mrs. Baer. We found out that we could pool our reserves and buy one hundred cases of the liquor. I went to Mr. Small and gave him these checks. These checks are made out to "Cash" but they are endorsed by Mr. Small. On one of them, he had written his address. I heard from him and he said to go to the warehouse and get it. It was a San Francisco warehouse. He did not tell me who to see there. I went to the warehouse they told me. I saw a man coming out with some of it for Oakland. He said he got his and I would have to go down and see Rollandelli. I went down to Mr. Rollandelli's office; it is on Broadway near Sansome. I did not see Mr. Rollandelli. [22] I do not know who was in the office; it was a little short fellow. I did not see the young lady who was here this morning. They said they did not know anything about the deal. I then returned to Redwood

(Testimony of F. W. Larkin.)

City, very disappointed. Two or three, or three or four days thereafter, Mr. Small came down and said he had found out the deal was illegal and he did not want to have anything to do with it and returned my money.

Re-direct Examination

By Mr. Hammack:

It was about three weeks from the time I gave those checks to Mr. Small when he returned the money. I did not have any idea that the ceiling price of the whiskey was \$27.00 per case. I made out the check for \$27.00 per case because it was the balance of \$46.50. I did not have any idea what the ceiling price was. I was glad to pay so much down and so much when I got the whiskey. I was glad to get it if I could keep my place of business open. I did not know that \$46.00 was in excess of the ceiling price. Right now I am paying \$41.25 for 80 proof whiskey on the legitimate market—I do not buy whiskey any other way—I am paying \$41.25. This is a seven year old whiskey. I do not buy any whiskey that is practically all brandy. I do not sell any whiskey like Baltimore Club Special Reserve whiskey—I never saw any of it and I do not know what grade it is. I do not know what proof it is. I thought it was 90 proof—I do not know. You have to use the whiskey that a legitimate house gives you; it is supposed to be fit to drink or they are not allowed to sell it under the Pure Food law. I did not think I would pick up any poison from a legitimate house. I knew that Baltimore Club whiskey was whiskey. Mr.

(Testimony of F. W. Larkin.)

Small told me it was whiskey and I took his word for it. [23]

Re-Cross Examination

By Mr. McDonald:

I have been in the liquor business a good many years. I have been in the liquor business since 1908 right here in San Francisco and I was a barkeeper before I had my own place. I have known of the firm of Rollandelli & Sons for a great number of years but have never had any dealings with it. I have known their reputation in the trade. They have a reputation for selling fairly good liquor. I know them to be an established liquor firm in San Francisco. When I heard this whiskey was coming from Rollandelli, I believed it to be legitimate whiskey. I did not think it was moonshine or anything like that. I am now paying \$41.00 per case for whiskey. That is a Mexican liquor that isn't even whiskey and I am paying \$43.00 per case for it. It is Hibernet, a Mexican liquor. You have to take so much of it to get a case. In other words, to get a case of whiskey, you have to buy a couple of cases of this Mexican liquor. In order to buy a case of whiskey, you have to buy certain cases of soda-water, Vodka or other things. This liquor has a content of 100 proof; some 90, some 100. When Mr. Small told me he could get this liquor, we had no discussion about ceiling at all. I did not think there was anything wrong with it; otherwise, I would not have had anything to do with it. The liquor was to be secured from a reputable liquor

(Testimony of F. W. Larkin.)

house. We are required by the State Board of Equalization to keep a record of our invoices. If there was any liquor in the place, I would be liable to lose my license.

GEORGE MONCHARSH,

called as a witness for the United States, testified in substance as follows: [24]

Direct Examination

By Mr. Hammack:

My name is George Moncharsh. I am a lawyer. I am Chief Enforcement Attorney for the Office of Price Administration in this district. My address is at 1355 Market Street, San Francisco, California. I have met Mr. Small in connection with my official duties. Mr. Small is the second gentleman behind the attorney. I believe I first met Mr. Small around the middle of November, 1943. The first time I saw him was directly outside my office; that is, in the main room of the Enforcement Division right outside of my office. My office in San Francisco. This is how I happened to see Mr. Small. I was in another part of the district office and I received word from one of the investigators that Mr. Small was in the office and wanted to talk to me. Thereafter I talked to Mr. Small. I went down to my office and met Mr. Small right outside of my office and he and I went into my office and had a conversation. Mr. Small was with me pretty

(Testimony of George Moncharsh.)

close to an hour and the substance of the conversation is that I discussed with Mr. Small this matter of the sale of Baltimore Club Special Reserve whiskey to Mr. Larkin. Mr. Small said that he felt some embarrassment over the situation and that he wanted to explain his connection with the Bartenders Union; the principal motive that he had in mind was to see to it that the bartenders had enough whiskey to sell; that was part of his job.

I said, "Mr. Small, aside from that, you knew, of course, that you sold the whiskey over the ceiling," and he said, "Well, I wasn't sure at the time whether I sold the whiskey"—referring to the 100 cases that was sold to Mr. Larkin.

I said, "Mr. Small, do you think \$46.50 per case was at or within the ceiling price?"

He said, "No, I realize that, but I didn't know specifically [25] what it was."

I said, "Mr. Small, didn't you know the ceiling was \$27.00 at the time you made this sale?"

He said, "I know it was somewhere around there but I didn't know exactly."

I said, "Well, Mr. Small, the main point is that you are sitting here discussing with me not the main thing, the motive you had in mind, to supply the bartenders with whiskey, but the problem of the sale of whiskey over the ceiling."

He said, "I understand that."

I asked him, "Who else did you sell this whiskey to?"

(Testimony of George Moncharsh.)

He said, "I wouldn't care to say."

I asked him with whom he had made arrangements to secure this whiskey.

He said, "I would rather not say."

So I said on his unwillingness to tell me to whom else he had sold the whiskey and with whom he had made arrangements to get the whiskey to sell, during the course of a part of the conversation, I said, "Well, Mr. Small, I would just like to know one thing. Is it physical fear that you are afraid of? That someone might do something to you physically?"

He said, "No." He said, "After all, I have been around enough and I think I can take care of myself, but in my type of work, people rely upon me to keep my mouth shut and I am going to keep my mouth shut. If I have to take the rap, I will take it."

I asked him if he knew why the whiskey was not delivered—when I say "delivered," I mean delivered to Larkin.

He said, "Yes, I know. I know there was a legal proceeding in San Francisco, and as a result of those legal proceedings the whiskey that Rollandelli had got tied up and I couldn't get it to deliver it."

A little time was spent with my asking what connection he [26] had with Rollandelli. He said that, of course, he knew that the whiskey he was selling was the Baltimore Club Special Reserve at Rollandelli's, that he was selling this whiskey of Rollandelli's to Larkin. One of the phases on this

(Testimony of George Moncharsh.)

subject: more or less toward the conclusion I had said to Mr. Small that I did not want him to do anything that might lead him to believe that I was making him any promises; that I had no authority to make any promises; that he would have to use his own judgment or rely upon the judgment of an attorney or people in whom he had trust to decide those things.

He said to me, "Well, what would happen if I were to give you the names of these people with whom I had the arrangements and the names of the other people to whom I have sold?"

I said, "Well, before I would answer you I would want you to make up your mind that you are willing to give that information, and if you are ever willing to give that information, the next step would be that I would have you taken over to the United States Attorney's office, where you would have a conversation with them and not with me."

He then went back to his original stand, that as far as he was concerned, he was not going to talk, regardless of what happened, as he used the expression several occasions in that conversation, he would take the rap.

I said, "Well, all right, Tiny, that is something for you to decide. If I may make a suggestion, I would suggest that you go home and talk to people whom you know and in whom you have confidence, and if you ever change your mind, let me know." I never heard from Mr. Small after that. That is the only conversation I have ever had with him.

(Testimony of George Moncharsh.)

Cross Examination

By Mr. McDonald:

My office is in the Furniture Mart at 1355 Market Street. [27] My office is on the third floor. Mr. Small did not see me by appointment. He was up in the office at the request of one of my investigators and I was told he wanted to see me. He told me that he was the business agent of the Bartenders' Union. I also think I knew that sometime before. I knew that they were having a great deal of difficulty getting liquor in San Mateo County; that is not confined to San Mateo County. He did not mention that he looked in the Beverage News or other papers to find what the ceiling price of this liquor was. The ceiling price of Baltimore Club is not published in any document or publication. If a consumer wanted to find out what the price was, he would call at the San Francisco District Office and ask for the price clerk who handles liquor and ask him what the ceiling price on Baltimore Club Special Reserve is. He could also go to the price panel of any War Price Rationing Board and if they could not compute it, they, in turn, would call the price desk at the San Francisco office and get the information. I am familiar with the 100 cases of whiskey that are involved in this case. I know that Mr. Larkin did not get any of the whiskey. I know that an injunction intercepted any attempt to get the liquor. I do not know whether or not the money was returned.

F. W. LARKIN

Recalled for further testimony.

Direct Examination

By Mr. Hammack:

I am familiar with the check that you showed me dated October 5, 1943. It is a check for \$780.00. That check was made out to me because I was going up and did not know who to make it out to. I gave it to Mr. Small; I endorsed it and gave it to Mr. Small and he endorsed it. That check represented the down payment on the liquor I was going to get—the down [28] payment was \$19.50 per case. The check you show me now, dated October 21, 1943, is for \$1080.00. It is made payable to Rollandelli & Company. This was the balance on the whiskey—\$27.00 per case, but I cashed it myself. Mr. Small told me that that was the balance.

Cross-Examination

By Mr. McDonald:

This check to Rollandelli Company bears the signature of F. W. Larkin and is marked "Refund to purchaser" by an official of the bank. I received the money back. This money was not paid for anything. It was received from Mr. Murray, an officer of the bank, and placed in my account; it was not paid for anything.

CLYDE O. BIRD,

called as a witness for the United States, testified as follows:

Direct Examination

By Mr. Hammack:

My name is Clyde O. Bird. I am an investigator for the Office of Price Administration. I have met the defendant in this case, T. A. Small, who is the second gentleman on that side (indicating). I first met Mr. Small about two weeks ago at the Office of Price Administration, at my office. I had a conversation with Mr. Small. Mr. Sidney Fineberg, the enforcement attorney, was present at a part of the conversation; he is in the Army—at Fort Ord, I understand. The conversation took place about two weeks ago. He came to my office and we were discussing this sale of Baltimore Club whiskey. I asked him to tell me in his own words his part of the transaction of the sale of Baltimore Club whiskey. He said that an arrangement was that he was to sell it for \$46.50 per case and that he was to get \$1.75 per case for his commission for selling it. He sold 100 [29] cases to Mr. Larkin and that he sold 300 cases to other people whose names he would not tell me without consent of his counsel.

I asked him how he came to make arrangements for the sale of the whiskey and general questions that might bring out his part in the transaction. He told me that he made arrangements to sell it for \$46.50 per case; that he sold this 100 cases here and about 300 cases more; that he collected approxi-

(Testimony of Clyde O. Bird.)

mately \$19.50 per case, which he turned over to other parties involved in the transaction, and that the ceiling price of \$27.00 per case was to be paid to the distributor, Rollanelli; that he knew it was illegal; he was the secretary of the Bartenders Union, was connected with the Bartenders' Union, and that he was very much interested in seeing that all of his members were employed, and that he was primarily interested in getting liquor for them, although he did tell me on a number of occasions in the presence of Mr. Fineberg that he was to get \$1.75 per case for his commission personally to himself. Well, he refused to tell me the names of the other people to whom he sold approximately 300 cases without permission of his attorney. He gave me the name of another Union man who was in the transaction with him. I asked him if he would be willing to testify against this other party and he told me he would not testify against him unless he got the permission of his attorney.

Cross-Examination

By Mr. McDonald:

I do not remember whether Mr. Small told me that if he could aid us in any way in finding the principals in this case, he would do that, but he did not want to bring in another unfortunate man who was sucked into the deal like he was. He refused to tell me the people he sold the liquor to and refused to tell other than what I have related here. He told me the name of a man but also told me he would not testify against this man because [30] he

(Testimony of Clyde O. Bird.)

was another Union delegate. He did not tell me that this was a married man with three children. This conversation occurred at my office about two weeks ago—I haven't the exact date. I have not been investigating this case since the beginning.

He did not tell me that there had not been one bottle of this liquor delivered. I know that there was some of this liquor delivered—I do not know how much. I know there was some Baltimore Club delivered. I don't know of my own knowledge whether Mr. Small sold it or not. I understand the whole thing has been delivered now but previous to the time I talked to Mr. Small, there had been 10 cases delivered in Alameda County. I don't know who took the order for that. I don't know if any of the liquor that Mr. Small sold was ever delivered. I don't know whether any of this liquor was ever delivered in San Mateo County.

(Witness excused.)

Mr. Hammack: At this time, may it please your Honor, I wish to offer in evidence the judgment of this Court signed by His Honor, Honorable Louis E. Goodman, an injunction, judgment for preliminary injunction against the Rollandelli Co., a corporation, and Frank De Paulo, and ask that it be marked Government's exhibit next in order.

Mr. McDonald: I can't see any possible materiality to this case. It is a transaction between De Paulo and Rollandelli, and the Office of Price Administration. Mr. Small is not a party to that case.

Mr. Hammack: It is material in this case in view of the statement made by counsel that none of the whiskey was ever delivered in this case. It shows why there was none delivered. There was an injunction restraining any being delivered.

The Court: Very well. It may be admitted. [31]

Mr. McDonald: Exception.

(Exception No. 1.)

Mr. Hammack: That is the Government's case, your Honor.

(Government rests.)

Mr. McDonald: The defendant, if your Honor please, has nothing to say, any more than the Government's case, and we will submit the matter. I should like a little time to argue it.

(Defendant rests.)

The Court: Yes. The Government rests and the defendant rests, is that right?

Mr. Hammack: Yes, your Honor.

The Court: How much time do you want for argument?

Mr. Hammack: Not over 20 minutes, your Honor.

The Court: How much do you want?

Mr. McDonald: I should like 20 minutes.

The Court: Yes.

(Whereupon a recess was taken until 2:00 o'clock p.m.)

Afternoon Session.

The Court: Ladies and Gentlemen of the Jury, I will ask you to retire for a few minutes to the jury room. We will call you when we need you. Remember the admonition heretofore given.

(Thereupon the Jury retired.)

The Court: I think it advisable to say something to you before you argue the case to the jury.

Mr. McDonald: Might I interrupt, your Honor. I would like at this time in the absence of the jury to interpose a motion for a directed verdict.

The Court: Let the record show that the motion for a directed verdict is denied and an exception noted.

(Exception No. 2.) [32]

The Court: I am going to tell the jury that there was no sale but there was an attempted sale; and I am going to read the law upon the subject. I wanted to let you know that before I gave the instructions. (After argument.) Bring the jury in.

Mr. McDonald: May the record show that I made a motion for a directed verdict in the presence of the jury?

The Court: You may renew it if you wish.

Mr. McDonald: I make a motion for a directed verdict in the presence of the jury.

The Court: Motion denied.

Mr. McDonald: Exception noted.

(Exception No. 3.)

Thereupon counsel argued the case to the jury,

and at the conclusion thereof, the Court instructed the jury as follows.

The Court (Orally): Ladies and Gentlemen of the Jury: you have here for your consideration an information containing one count, which charges substantially that the defendant T. A. Small, on or about the 5th day of October, 1943, in Redwood City, County of San Mateo, State of California, did wilfully and unlawfully sell to one F. W. Larkin at a price of \$46.50 a case, certain distilled spirits, to-wit, one hundred cases, each of which said one hundred cases contained twelve fifth bottles of Baltimore Club Special Reserve Whiskey, and that said price of \$46.50 per case for said whiskey was in excess of, and higher than, the maximum price established by law, to-wit: \$27.60 per case, as the said defendant then and there well knew.

I instruct you that the facts adduced at the trial do not support the charge in the information that defendant made an actual sale of whiskey to said Larkin, because he at no time had title to the whiskey nor was he able to secure such title. It might be found from the evidence, however, that there was an [33] abortive sale or a contract to sell goods which the seller was unable to carry out.

In all criminal cases the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment or information, or may be found guilty of an attempt to commit the offense charged, if such attempt be itself a separate offense.

Section 4(a) of the Emergency Price Control

Act provides that it shall be unlawful to offer, solicit, attempt or agree to sell or deliver any commodity in violation of the maximum price schedule established by the Office of Price Administration.

I further instruct you that Maximum Price Regulation No. 445, Section 7.8, entitled "Compliance with this regulation," provides as follows:

"(a) No buying or selling above maximum prices.

On and after the effective date of this regulation, regardless of any contract, agreement or other obligation, no person to whom this regulation applies shall sell or supply, and no person in the course of trade or business shall buy or receive, any distilled spirits, wine or service at prices higher than the maximum price applicable to such sale under this regulation, and no person shall agree, offer, solicit or attempt to do any of the foregoing. However, prices lower than the maximum price may be charged or paid.

"(b) Evasion. The maximum prices established under this regulation shall not be evaded by direct or indirect methods, whether by finder's fee, brokerage, commission, service, transportation or other charge or discount, premium or other privilege; by tying agreement or trade understanding; by any change in style or manner of packing; or in any other way."

I further instruct you that Maximum Price Regulation No. 445, Section 5.4, establishes the maximum ceiling price for which [34] wholesalers may sell distilled spirits as follows: The net cost to the

wholesaler, plus a 15% markup in addition thereto.

In other words, for illustration, if the total cost to the wholesale, let us say, is \$24.00 per case, his maximum price for resale to the wholesaler's customers would be fixed by adding 15% to the cost, or 15% of \$24.00, a total of \$27.60 per case.

I further instruct you that under Maximum Price Regulation No. 445, sale of distilled spirits is wholesale when made to a retailer of the same, as distinguished from the ultimate consumer.

Now, I repeat to you, the evidence does not support a charge that there was a sale. The evidence shows that Mr. Small did not have any whiskey, nor could he get it. The whiskey involved here was restrained from sale by an order of this court. But as I have said to you, if after a consideration of all of the evidence in the case and applying thereto the instructions which I will give to you, you find that the defendant here was guilty of an attempt to sell, you may find him guilty of the charge; otherwise you must acquit him.

The information is a mere accusation against the defendant; it is not any evidence against him, and it gives rise to no presumption of guilt.

The defendant is presumed to be innocent at all stages of the proceeding until the evidence introduced on behalf of the government shows the defendant to be guilty beyond a reasonable doubt, and this rule applies to every material element in the case. Mere suspicion will not authorize a conviction.

A reasonable doubt is not a mere possible doubt because everything relating to human affairs and depending upon oral evidence is open to some possible or imaginary doubt. A reasonable doubt is not a doubt which may be based upon whim or which may be based upon sympathy. A reasonable doubt means what the words import, a doubt based upon reason. It is that state of the case [35] when after a comparison and consideration of all of the evidence the jurors find their state of mind to be that they cannot say they feel an unabiding conviction to a moral certainty of the truth of the charge.

In connection with these instructions I must impress upon you that if the evidence is susceptible of two interpretations, one of innocence and one of guilt, it will be your duty to accept the interpretation of innocence.

The burden is upon the government to prove the defendant guilty. The defendant does not have to prove his innocence. The burden at all time rests upon the government; the government must prove every material allegation of the information, and the instruction that I have given you about reasonable doubt applies to every material part of this case.

You are the sole judges of the facts and of the credibility of the witnesses. You may judge the credibility of a witness by his appearance on the stand, by his intelligence, whether or not he has contradicted himself or is contradicted by others, his interest in the case, what relation, if any, he bears to the defendant in the case, and what rela-

tion he bears, if any, to the government. And you may draw such inferences which may arise in your mind which may be used by you in determining the credibility of a witness.

I will repeat: you are the sole judges of the credibility and weight of the evidence. The court has no business to tell you how to decide this case, and anything that I have said during the trial of this case or anything that I may say during the course of these instructions that may give you the idea that I have any opinion as to the guilt or innocence of the defendant, you must wholly disregard, because you are the judges of the facts; that is your responsibility, the law places it there.

The defendant here has seen fit not to take the witness [36] stand, and that is his right. He has a right to rely on what he considers the insufficiency of the evidence of the government to convict him. Our constitution provides that a man may not be compelled to be a witness against himself, and you must not hold that against the defendant in any way whatsoever. He is standing upon his rights and that is what he is entitled to do. Now, as I say, he stands mute here, and that is his privilege,—not only his privilege but his right under our procedure.

Jurors are expected to agree upon a verdict where they can conscientiously do so. You are expected to confer with one another in the jury room, and any juror should not hesitate to abandon his or her own view when convinced that it is erroneous. In determining what your verdict will be you are to consider only the evidence before you; any testi-

mony as to which an objection was made and sustained, and any testimony which was ordered stricken out must be wholly left out of account and disregarded.

Your verdict must be unanimous.

The clerk has prepared for your convenience a form of verdict, which reads, after the entitlement of the court and cause, "We, the jury, find the defendant, T. A. Small, the defendant at the bar"; then follows a blank line and then a blank line for the signature of the foreman. When you have agreed upon a verdict the foreman will sign it and you will be returned to court.

Have counsel any exceptions?

Mr. McDonald: No exceptions, your Honor.

Mr. Hammack: No exceptions, your Honor.

(Thereupon at 2:52 the jury retired and returned into court at 3:09 PM with a verdict of guilty.)

And now, and within due and legal time after the aforesaid [37] judgment, and within the time fixed by the trial Court for the preparation, service and filing of the Bill of Exceptions, the defendant herein serves, lodges and presents this, his Proposed Bill of Exceptions, to be used upon his appeal heretofore taken to the United States Circuit Court of Appeals for the Ninth Circuit from the aforesaid judgment and prays that said Bill of Exceptions be, by the Court, settled, approved and allowed, and that the same may be used on the appeal of said

defendant to said United States Circuit Court of Appeals.

Dated: This 31st day of March, 1943.

FRED McDONALD

Service of the within Bill of Exceptions copy admitted this 31st day of March, 1944.

FRANK J. HENNESSY

United States Attorney

By: VALENTINE C. HAMMACK

Assistant United States

Attorney. [38]

STIPULATION

It Is Hereby Stipulated that the foregoing twenty-two (22) pages truthfully set forth the proceedings upon the trial of the defendant T. A. Small and that they contain, in narrative form, all of the testimony taken upon said trial, together with all objections made by the said defendant and the rulings thereon and the exceptions noted by said defendant, and that the foregoing may be settled, allowed, certified and approved as the Bill of Exceptions in the above entitled matter;

And it is further stipulated that an Order be made by the Court that the Clerk of said Court file the same as a record in said cause and transmit

it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

FRANK J. HENNESSY

United States Attorney

By: VALENTINE C. HAMMACK

Assistant United States

Attorney.

FRED McDONALD

Attorney for Defendant.

[Endorsed]: Filed Apr. 7, 1944. [39]

ORDER SETTLING BILL OF EXCEPTIONS

Pursuant to the stipulation of counsel, it is hereby ordered that the foregoing document, containing twenty-two pages, lodged with the Clerk of this Court, entitled "Defendant's Proposed Bill of Exceptions" may be and the same is considered to truthfully set forth the proceedings upon the trial of the defendant T. A. Small and that it contains in narrative form all of the testimony taken at said trial, together with all objections made by said defendant and the rulings thereon and the exceptions noted by said defendant, and it may be and is hereby settled, allowed, certified and approved as the Bill of Exceptions in the above entitled matter;

And it is further ordered that the Clerk of the said Court file the same as a record in said cause and transmit it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Dated:

A. F. ST. SURE

Judge of the United States
District Court. [40]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the United States District Court:

The following are the papers that defendant and appellant designates as the papers necessary for the transcript on appeal in the above entitled matter: .

1. Information
2. Minute Order January 4, 1944, Defendant's Plea *or* Not Guilty.
3. Minute Order January 8, 1944, Jury Impaneled, Evidence Introduced, Jury Returned Verdict of Guilty.
4. Verdict.
5. Motion for New Trial
6. Motion for Arrested Judgment
7. Minute Order—Motions for New Trial and Arrested Judgment Denied
8. Assignments of Error
9. Bill of Exceptions.

Respectfully,

FRED McDONALD

Attorney for Defendant and
Appellant.

[Endorsed]: Filed Mar. 28, 1945. [41]

District Court of the United States,
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 40 pages, numbered from 1 to 40, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of United States of America, Plaintiff, vs. T. A. Small, Defendant, No. 28263 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$5.15 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 10th day of April, A. D. 1945.

[Seal]

C. W. CALBREATH,
Clerk

By M. E. VAN BUREN
Deputy Clerk [42]

[Endorsed]: No. 10982. United States Circuit Court of Appeals for the Ninth Circuit. T. A. Small, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 12, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.